IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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Civil Action No. 51-0-613

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CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; AND WABASH RAILROAD COMPANY, PLAINTIFFS-APPELLANTS

AND

JOHN MORRELL & COMPANY, INTERVENER-APPELLANT

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

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**MOTION TO AFFIRM**

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Appellees, United States and Interstate Commerce Commission, pursuant to Rule 12, para-

graph 3, of the Revised Rules of the Supreme Court of the United States, move that the decree of the district court be affirmed.

This is a direct appeal from the final decree, entered on June 1, 1951, by a district court of three judges specially constituted pursuant to 28 U.S.C. 1253, 2284, and 2325, dismissing appellants' complaint, which sought to set aside an order made by the Interstate Commerce Commission. Appeal was allowed on June 26, 1951, and appeal papers served on the Attorney General of the United States and on the Interstate Commerce Commission on July 30.

The Commission order involved in this appeal finds that the interchange tracks located at the packing plant of intervener-appellant, John Morrell & Company (hereinafter called "Morrell"), constitute the reasonable point for the receipt and delivery of loaded and empty freight cars, and the point at which line-haul railroad transportation to and from that plant begins and ends; requires that the plaintiffs-appellants, four railroads serving the plant, cease and desist from paying allowances to Morrell for Morrell's performance of switching and spotting service within its industrial plant, beyond the interchange tracks; and prohibits the railroads from performing that service for Morrell without making reasonably compensatory charges in addition to the regular line-haul rates. The pertinent reports of Division Three of the

Commission appear in 215 I.C.C. 431 (1936), 263 I.C.C. 69 (1945), and 277 I.C.C. 173 (1950). The final report of the entire Commission is reported in 280 I.C.C. 419 (1951).

The order was entered in the forty-eighth supplemental proceeding which has taken place pursuant to the Commission's Ex Parte No. 104 proceeding, *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services.* Almost one hundred similar orders have been entered, and of all of these that have been reviewed in the courts—some thirty-five orders—have been sustained. The general legal principles involved have been repeatedly examined by the courts and were recently summarized by this Court in *United States* v. *United States Smelting Co.*, 339 U.S. 186, 189-190, as follows:

> The Commission undertook its general investigation, *Ex parte 104,* in the interest of establishing a uniform and equal service for shippers. The Commission concluded that carrier obligation for transportation service ends customarily when delivery is made at a convenient point on the siding inside or outside a consignee's plant. This delivery is such as may be accomplished in one continuous movement without "interruption" occasioned for the convenience of the industry, and is only the equivalent of team track or simple placement switching. In the Commission's view as developed in *Ex parte 104,* such a convenient delivery point marks the beginning

and end of what is termed "line-haul" transportation, and is the extent of the service which may be performed under the line-haul rate. The Commission's authority to determine the point where transportation duty ends and industry convenience begins was upheld by this Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402. We have repeatedly sustained the Commission in its application of *Ex parte 104* principles to particular plants where it has prohibited the performance of services beyond the point fixed under a line-haul rate. In issuing cease and desist orders in these cases the Commission has acted pursuant to its duty to enforce § 6(7) of the Interstate Commerce Act, which section prohibits departure from filed tariffs and the rendering of preferential services.[1]

Here, the Commission concluded after extended investigation and hearings that the railroads could not perform switching service at the Morrell plant, beyond the interchange tracks, at their ordinary operating convenience. This was rested in part upon findings that the carriers "would have to use the same tracks to a considerable extent to reach the various loading and unloading points within the plant area, which could not be done without interfering with one another, and in addition,

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[1] See, also, *Corn Products Refining Co.* v. *United States*, 331 U.S. 790; *Hanna Furnace Corp.* v. *United States*, 323 U.S. 667; *United States* v. *Wabash R. Co.*, 321 U.S. 403; *United States* v. *Pan American Petroleum Corp.*, 304 U.S. 156; *A. O. Smith Corp.* v. *United States*, 301 U.S. 669; *Goodman Lumber Co.* v. *United States*, 301 U.S. 669.

would have to contend with industry power" which is used by Morrell for various intra-plant rail operations which it conducts (280 I.C.C. at 420).[2] Dealing with Morrell's contention that the interference was caused by the presence of several carriers, rather than by the industry, and that the principles enunciated in *Ex Parte No. 104* apply exclusively to interference caused by the industry, the Commission specifically found that the root cause of the difficulty encountered in making uninterrupted deliveries on the industry's tracks was a "plant disability," the fact that Morrell had "insufficient facilities" (280 I.C.C. at 421).

The district court has written a careful opinion and has entered detailed findings of fact. Speaking for the court, Judge Lindley stated that "the maps which were introduced in evidence, showing the complete track layout and the location of the various loading and unloading points within the Morrell plant, considered in conjunction with the reports of the Commission's inspectors who had made on-the-spot studies of the terminal service practices and facilities at the plant, would certainly seem to provide ample evidentiary support for the Commission's findings that the plant's facilities are insufficient for the carriers to make deliveries at their convenience without interference from one another and from the industry's

[2] Other characteristics of Morrell's facilities on which the Commission made detailed findings are summarized in the district court's Finding No. 4, discussed *infra*.

engine" (Op., p. 5). While no effort will be made here to set forth the detailed and voluminous evidence upon which the Commission's findings in this case are based—evidence which is noted and considered in the various reports—we invite the Court's attention to the comprehensive nature of that evidence. On this subject, the district court stated in its Finding No. 4:

> Many facts relating to existing traffic conditions at the Morrell plant are noted and considered in the several reports. These facts show the size of the plant, track layout, distances between points, and capacities, the location and number of buildings, loading and unloading points, and the car movement by each carrier necessary to reach each point, the volume and character of traffic moving in and out of the plant and the manner and movement required of each carrier in order to switch each commodity handled, the location and use of interchange tracks by carriers in delivering and receiving cars at the plant and the movements performed by plant-owned engines within the plant, the interferences and interruptions to movement of cars within the plant resulting from blocked and overloaded tracks, use of "hold tracks" while waiting the clearing of loading and unloading tracks, the coordination of spotting service in the plant to meet the requirements of industry operations resulting in delays and stand-by engine service. Commission agents, who observed the plant, presented evidence as to the industry operation

> and car movements, including a spot check of particular identified cars as each moved to and from the interchange tracks, through the plant, submitted in written reports.

The court went on to state that "this evidence is of the type and character previously held by the courts sufficient to disclose the existing traffic conditions at particular industrial plants and used in prior *Ex Parte No. 104* supplemental proceedings as the basis of Commission determination of what is common carrier transportation and what is plant or industry service, and where, in point of time and space, transportation under the line-haul obligation begins and ends" (ibid.). There can be no serious question as to the correctness of this conclusion.

Morrell has emphasized, throughout the proceedings, that the carriers and Morrell have operated, in the past, according to a plan whereby the industry's engine moves traffic in and out of the plant during the daytime (the carriers paying the industry an allowance on such traffic), while the carriers operate with their own engines at night, when the plant is closed to ordinary operations. This shows, appellants contend, that the interference with carrier delivery is merely potential and not actual. As the district court quite properly observed, however:

> The fact that carrier spotting of livestock cars is done only at night, when neither the plant

> nor the industry's engine is in operation, certainly does not tend to show that the carriers are able to make deliveries to the unloading pens, in uninterrupted movements at their operating convenience but rather would seem to indicate, if anything, a recognition on their part of the fact that interference would be encountered if deliveries were attempted during the hours when the plant and the industry's engine are in operation. (Op., p. 6)

Appellants further contend that this case is different from the ordinary *Ex Parte No. 104* case to the extent that the traffic involved consists of livestock.[3] Relying on *Covington Stock Yards* v. *Keith*, 139 U.S. 128, and similar cases, they state (Statement as to Jurisdiction, p. 12):

> In the *Covington* case the court held that the delivery [of livestock] to a private point suitable for unloading could not be made the basis for a charge in addition to the line-haul rate. The same ruling should apply at the Morrell plant, located in Ottumwa, Iowa, where the only point suitable for unloading is furnished by Morrell. There are no public stockyards in the city.

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[3] The only section of the Interstate Commerce Act which makes a distinction between commodities in defining the limits of transportation is Section 15 (5), 49 U.S.C. Sec. 15 (5). That Section requires railroads carrying livestock to *public stockyards* to deliver the animals to suitable pens. By its express terms, it has no application whatever to deliveries of livestock to private packing companies. Neither the Commission nor the courts have held in any case that any commodity destined for an industrial shipper is lawfully entitled to delivery switching in excess of team track delivery.

There is no conflict between the cases cited by appellant and the present decision. Concededly, an industrial shipper of livestock, or of any other commodity, is normally entitled to have its traffic switched to a private siding which it designates for unloading. And it is clear that no added charge may be made for a simple placement of the cars at the designated point. The *Ex Parte No. 104* cases fully recognize this but hold that there is a limit to the terminal service to which the shipper is entitled: the carrier's duty does not go beyond the point where the carrier encounters interruption or interference caused by the shipper. Morrell's contention, which appears to be that it is, in all circumstances, entitled to free delivery to the pens within its plant, carried to its logical extreme, would mean that the carriers would have to perform free terminal service even if performance entailed countless switching operations and an untold number of industry-caused delays. None of the cases cited by appellant furnishes the slightest support for such a proposition. Indeed, none of them involved any question of industry interference with delivery.[4] Appellants mistakenly assert that the district court failed to consider the cases which they cite. The court stated in its Conclusion of Law No. 9:

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[4] In the *Covington* case, the opinion makes clear that the place at which the shipper sought delivery was an adequate facility, "put in proper condition to be used for that purpose." 139 U.S. at 136.

> The Commission action in cases cited by plaintiff involved consideration of rates and services relating to livestock deliveries to particular points, and did not involve the decision as to where transportation begins and ends, as is considered in Ex Parte No. 104 supplemental proceedings.

The district court also declared, quite correctly, that "the authority of the Commission to decide where transportation begins and ends at a particular plant * * * is not limited to particular commodities or classes of commodities * * *" (*ibid.*).

Appellants also state that in a number of cases involving other packing plants the Commission has compelled carriers to make delivery to unloading pens without added charge. This is true, but it involves no inconsistency. Morrell can obtain free delivery to its pens by the simple expedient of providing adequate facilities for the placement operation. As Judge Lindley stated, "While it is true that the application of the general principles of Ex Parte No. 104 to the facts and circumstances of particular cases may result in *apparent* discriminations as between shippers, those apparent discriminations will vanish when it is seen that, in each case, the shipper is accorded delivery to such point as it designates if that point can be reached by the carrier in an uninterrupted movement at its operating convenience and, if not, to the point of interruption or interference" (Op., p. 9).

Appellants assert further that the Commission failed to find that the terminal services sought are not included in the line-haul rates. As the district court noted in dismissing this contention (Op., p. 7), the instant proceeding is supplementary to the original *Ex Parte No. 104* proceeding. In the main report in *Ex Parte No. 104,* 209 U.S. 11, 44, the Commission found that line-haul rates had not been fixed to compensate carriers for spotting service in excess of simple switching or team track delivery. The purpose of the supplemental proceedings is to determine whether in particular cases services in excess of simple switching are being performed. That was found to be the case here. If such finding has a rational basis—and we believe it clear that it has—then, the cease and desist order is valid.

Appellants also argue that a substantial issue is presented with respect to the possible application of the so-called Twenty-Eight Hour Law (45 U.S.C. §§ 71-74). That law, dealing with the care of animals in transit, prohibits railroads from confining cattle in cars for more than twenty-eight consecutive hours, without unloading for rest, water and feed, making it the duty of the person in custody of the animals to feed and water them, at the cost of the owner. It is plain from the statute—and appellants do not contest the point—that the carrier's duty under the Twenty-Eight Hour Law is terminated when it makes delivery of the cars.

*United States* v. *Philadelphia R. Co.*, 233 Fed. 202 (E.D. Pa.).[5] Appellant's argument appears to be that, since the Commission is not charged with enforcement of the Twenty-Eight Hour Law, it could not properly determine, in this case, when transportation comes to an end, i.e., the point in the Morrell plant where delivery to Morrell was completed. That argument is untenable. It is within the exclusive jurisdiction of the Commission to determine, for purposes of the Interstate Commerce Act, the point at which transportation begins and ends. *United States* v. *Wabash R. Co.*, 321 403, 408; *United States* v. *United States Smelting Co., supra.* That the question of what constitutes a delivery may also be material in a case involving application of the Twenty-Eight Hour Law—a law which the Commission does not administer—nowise detracts from the Commission's duty and authority to determine what services are covered by existing line-haul rates.

The Commission's decision leaves Morrell free to do one of three things: (1) it can make its pens reasonably accessible and obtain delivery to that point free of charge; (2) it can retain the existing set-up and move the cars from the interchange tracks to its pens with its own engine; or (3) it can employ the carrier's engines for that purpose, paying a reasonably compensatory fee for the service.

[5] If the consignee fails to unload them promptly thereafter, that, of course, is solely the consignee's responsibility. See *ibid.*

It cannot, however, receive a highly specialized delivery service of a kind that is necessitated by the deficiencies of its own plant, without paying for that service. The Interstate Commerce Act, § 6(7), prohibits preferential delivery service. Nothing in the Twenty-Eight Hour Law requires it.

Appellants also claim that the decision places rail carriers at a disadvantage in competing with motor carriers which provide free pick-up and delivery service, and that it accordingly violates the National Transportation Policy (49 U.S.C., Notes preceding §§ 1, 301, 901 and 1001) which directs the Commission to administer all provisions of the Interstate Commerce Act fairly and impartially. Appellants fail to note that the National Transportation Policy also requires the Commission so to administer the Act as "to recognize and preserve the inherent advantages of each" type of transportation. Rail carriers have repeatedly contended in previous *Ex Parte No. 104* cases that the pick-up and delivery service which motor carriers characteristically provide gives them an unfair competitive advantage. In no case has the contention prevailed.

The only real issue raised by this litigation is whether the record as a whole supported the Commission's finding that the kind of delivery Morrell had been receiving was in excess of simple switching or team track delivery. The district court,

after a careful examination of the entire record, concluded that the Commission's determination was fully supported by evidence of the same "type and character previously held by the courts sufficient" (Fng. No. 4). The decree should be affirmed.

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AUGUST, 1951.

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IN THE

# Supreme Court of the United States

October Term, 1951

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*Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

*Appellees.*

**Appeal from the United States District Court for the Northern District of Illinois, Eastern Division**

## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Come now appellants herein, including the intervener-appellant, and respectfully submit this their brief in opposition to the motion to affirm heretofore filed by appellees, and served upon appellants on August 13, 1951:

### I.

Appellees imply that because the Commission came to certain conclusions in other cases involving terminal services at other industries, your function in this case is merely perfunctory and that you should approve what it did in this case forthwith.

However, this case is essentially different than the other cases. Issues and considerations are raised in this case which were not present in the others. In addition, this proceeding embraces matters not coming within the "principles" laid down in the Commission's original report in *Practices of Carriers Affecting Operating Revenues or Expenses, Ex Parte 104, Part II—Terminal Services,* 209 I.C.C. 11. There is not involved herein the question of whether this Court's decisions in cases involving terminal services at other industries were right or wrong, or whether reversal of the District Court's decree in this case would necessitate overruling or modifying such previous decisions.

It should be borne in mind that the questions involved are questions of law and not questions determinable only by nice balances of testimony of record. These substantial questions appear on the face of the Commission's reports in this proceeding. While we believe that much uncontradicted testimony was ignored by the Commission, the fault does not stop there. The Commission's reports themselves reveal what we believe to be serious errors of law used by it for its determination of this proceeding. It is our purpose in this appeal to present these errors for the full consideration of this Court, so that they may be corrected and not left to rest as disrupting precedent not in accordance with well established law.

The purpose of the motion to affirm is, under Supreme Court Rule 7(4), to determine whether "it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." At the outset we would like to point out that the Court below, possibly through oversight, committed two serious errors which, unlike other errors to be mentioned subsequently and mentioned in our Statement as to Jurisdiction, are not projections as it were of errors committed by the Interstate Commerce Commission in this proceeding, but

are new and distinct errors attributable to the District Court. These errors, we feel, are so manifest that they alone would warrant the denial of the motion to affirm. It is significant that these two errors are not referred to or explained in the motion to affirm.

In the first place, the District Court states, on page 6 of its opinion, that, "Their [plaintiffs' and intervener's] argument overlooks, we think, the fact that the Commission's findings with respect to plant disability and interference rest not alone on the fact that the Morrell plant is served by more than one carrier but are based also on the diversity of ownership of the tracks within the plant area, which makes it impossible for any one carrier to serve all the plant loading and unloading points without using or crossing tracks of the other carriers . . ." This conclusion of the Court is clearly inaccurate since the decision of the Division at 263 I.C.C. 73 specifically states that "it was stipulated by respondents' representatives at the hearing that if the carriers should undertake to switch the plant individually or by a pooling arrangement, they would be permitted to use any or all of the tracks in the plant irrespective of ownership." In addition, Section 1(18) of the Interstate Commerce Act specifically permits contracts between carriers, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching or side tracks. It is not known how heavy a part this error played in the reaching of the District Court's decision, but it cannot be denied that the statement of the District Court just quoted is manifestly inaccurate, in law and fact, and should be corrected.

In the second place, another distinct error was committed by the District Court, which error will be productive of widespread harm beyond the confines of this case alone if not speedily remedied. The District Court, in speaking of the Twenty-eight Hour Law, 45 U.S.C. 71-74, on pages

8 and 9 of its decision (Conclusion of Law Number 10), states as follows:

> "Therefore this transportation [of livestock] at the Morrell plant ends at such interchange tracks, and delivery at those points removes the animals from the custody of carriers and places that custody in Morrell. Any detention of animals in cars beyond the 28-hour limit after that delivery is the responsibility of Morrell, not the carriers . . ."

That detention of the animals beyond twenty-eight hours under the Twenty-eight Hour Law is the responsibility of Morrell and not the carriers in this situation is clearly inaccurate in law, and this inaccuracy is manifested by a bare reading of the statute itself. The statute, as it read prior to 1906, would support the District Court's holding, but the statute was expressly changed to relieve the owner or shipper from responsibility for detention beyond the 28-hour period, and placed that burden upon the carriers. Senate Report No. 975, 59th Congress, 1st Session, p. 4, wherein the views of the Secretary of Agriculture are endorsed by the Senate Committee, explains as follows:

> "10. Section 3 of the present bill—a penalty section—is changed by exempting the owner or shipper of the livestock from the penalty for failure to unload for food, rest, and water . . . Inasmuch as the carrier is assured payment for food furnished, it is thought the primary liability for failure to unload should be laid upon the carrier."

The erroneous precedent established by the lower Court, that an owner or shipper takes over the responsibility for the detention of animals beyond the 28-hour period under the Twenty-eight Hour Law, may foment much litigation and confusion in the entire livestock transportation field. Apparently the lower Court relies upon this erroneous proposition for its decision, and if this decision is affirmed summarily by the Supreme Court it may cause serious ramifications.

On page 2 of the motion to affirm, *United States* v. *United States Smelting Co.*, 339 U.S. 186, 189-190, is quoted as summarizing the "general legal principles involved." In that quotation the Supreme Court speaks of delivery being made "without 'interruption' occasioned for the convenience of the industry." Important questions of law, as indicated in our Statement as to Jurisdiction, arise in this proceeding since, we contend, the Commission has completely distorted the concept of interruption occasioned "for the convenience of the industry" and has substituted erroneous criteria for the determination of carrier obligation under line-haul rates. For example, can the requirement as to delivery of livestock, as laid down by Congress under the Twenty-eight Hour Law, 45 U.S.C. 71-74, be ignored by the Commission in its "fact finding" function and can this requirement be "found" not to be required of the rail carriers but merely to be a matter of industry convenience? Can the common law requirement as to delivery of livestock, as announced in *Covington Stock Yards Co.* v. *Keith*, 139 U.S. 128, and consistently adhered to since the passage of the Interstate Commerce Act, be "found" to entail merely industry convenience? Can the requirement as to delivery of livestock under the Interstate Commerce Act, *Erie Railroad Company* v. *Shuart*, 250 U.S. 465, be found to be merely a matter of industry convenience? The law is well established that delivery of livestock means delivery to a point suitable for unloading and that a charge for such delivery in addition to the line-haul rate is unlawful. However, the Commission in this proceeding purports to overrule the mandate of Congress and reverse the common law. The Commission here holds that delivery of livestock to a point suitable for unloading is "special" and not required of rail carriers under line-haul rates. This holding we believe to be not only erroneous in law but beyond the Commission's statutory authority as given by Congress.

## II.

Another question not heretofore passed upon by this Court is whether the circumstance that more than one carrier serves an industry reduces the quantum of service which the carriers are required to furnish under their line-haul rates. This question was not involved in the original proceeding in *Ex Parte 104, Part II.* The Commission in this case has entered an order purportedly based on the principles announced in the original proceeding but actually based on matters not included therein. In this respect this case has nothing in common with those previously decided. The question of whether the number of carriers serving an industry is a circumstance which determines the obligations of each carrier under the line-haul rates is substantial because there are very many plants served by more than one carrier.

The Commission concluded that the several carriers serving the Morrell plant could not perform spotting service at their convenience, because they would interfere with each other. It was concluded further that such interference was a "plant disability." Thus, the Commission departed from the principles announced in the original *Ex Parte 104* proceeding. In substance, the principle announced in that proceeding was that the line-haul rates include pickup and delivery of carload freight at the usual and customary points of loading and unloading within a plant area, if such service can be performed without interference from the *industry.* Nowhere in the original report is there anything to indicate that the Commission adopted the principle that the transportation obligation under the line-haul rate ends at a point where a carrier encounters interference from *another carrier.* It is significant to note, also, the statement by appellees on page 6 of the motion to affirm that "the carrier's duty does not go beyond the point where the carrier encounters interruption or interference caused by the *shipper.*"

It is true the Commission attempted to prop up its conclusion by a generalization concerning "insufficient facilities", but it did not point out in what manner the "facilities" at this plant are alleged to be "insufficient."

In the final analysis, the Commission is now attempting to state a principle that the possibility of carrier interference is a plant disability which precludes each carrier from performing service.

In attempting to set up such a principle the Commission is acting beyond its powers, because in applying this principle in purported furtherance of its powers under section 6(7) of the Interstate Commerce Act, the Commission would be nullifying the provisions of another section of the same Act [section 5(1)]. This is the so-called "pooling" provision of the Act. Under that section the Commission is directed to approve the pooling of carrier service to promote economy and efficiency of operation. If the Commission is permitted to say that there is no duty to perform service because of the fact that the several carriers might interfere with each other, then such carriers are precluded from taking advantage of the poolin section of the Act and the Commission has thereby nullified its effect.

The Commission holds that *if* the railroads performed the switching, they *might* interfere with each other, and therefore there is no duty on any one of them beyond the interchange track. This imaginary hypothesis, chosen by the Commission as a basis for its order (although a novel concept in *Ex Parte 104, Part II* proceedings), must be carried to its logical conclusion. Let us see what alternatives are available *if* the industry should stop switching, and how interference between the railroads could be avoided. Of course, the industry could close up; or go entirely to truck, because the Commission says there is no duty *if* there *might* be interference. But what methods are available to remove carrier interference *if* the industry stopped switching:

1. Route all traffic over one carrier. There could then be no interference "with each other."
2. Pool, but the Commission (improperly) says that may not be done. In effect it nullifies that provision of law.
3. Create a switching line similar to that at Sioux City which has Commission approval. (*Sioux City Term. Ry. Switching*, 241 I.C.C. 53)
4. Create a transfer over which the three carriers would operate similar to that at Minnesota Transfer where nine carriers reach the industries, which the Commission approved. (*Terminal Allowance at Minnesota Transfer*, 268 I.C.C. 5, 10.)
5. Create an "arrangement" similar to that approved in the *Spencer Kellogg* case, where the railroads allocated different periods of time during which each would switch. (*Spencer Kellogg & Sons, Decatur, Ill.*, 262 I.C.C. 205, 213.)

## III.

Appellees state (p. 6) that "the carrier's duty does not go beyond the point where the carrier encounters interruption or interference caused by the shipper." No mention is made at this point of "carrier interference" causing any changes in the obligation. It is stated (pp. 6 & 7) that "Morrell can obtain free delivery to its pens by the simple expedient of providing adequate facilities for the placement operation." This statement prompts two comments. First, the record as a whole supports the conclusion that present facilities are more than adequate. This is the only reasonable conclusion that can be drawn from the evidence which shows that deliveries of livestock are being and have been made without interference. Secondly, if there must be read into the statement the assumption that the reference to "facilities" means that the several carriers must be assigned separate pens so as to obviate the possibility of their interfering with each other, then the statement does not square with the principle that only *shipper* interference diminishes a carrier's obligation under its line-haul rates.

Appellees state (p. 6) that, "It is clear that no added charge may be made for a simple placement of the cars at the designated point." Here the placement of livestock by the railroads is a simple placement at the unloading docks, and the Commission, the lower Court and appellees point to no instance that indicates otherwise.

Appellees do not cite, and we do not believe any case can be cited approving delivery of livestock short of an unloading dock. In contrast thereto it may be noted that the same livestock rate bases apply to and from Ottumwa as to and from Chicago, Sioux City, Omaha, St. Paul, etc., where the Commission held a switching charge *should be removed* under more adverse conditions, than here, as recited in the reports of the Commission. *Omaha Live Stock Exc.* v. *Chicago & N. W. Ry. Co.*, 178 I.C.C. 1; *St. Paul Livestock Exc.* v. *Chicago, M., St. P. & P. R. Co.*, 194 I.C.C. 53; and *Chicago Live Stock Exchange* v. *Atchison, T. & S. F. Ry. Co.*, 219 I.C.C. 531. At Ottumwa the Commission is adding a charge.

## IV.

In the original report in *Ex Parte 104, Part II, Propriety of Operating Practices—Terminal Services*, 209 I.C.C. 11, at page 44, the Commission stated:

> "... Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne."

It is asserted in the motion to affirm at page 7, that this constitutes a finding as to Morrell that the line-haul rates had not been fixed to include the services involved in this proceeding and that such a finding has a rational

basis. We submit that this conclusion as to "many" cannot be rationalized into a finding with respect to Morrell on this important question. The evidence of record stands uncontradicted that no additional services were rendered after the fixation of the line-haul rates by the Commission. Moreover, the reports of the Commission demonstrate the fact that the services at the Morrell plant have been *diminished* since the rates were fixed. Also, the Commission itself has asserted consistently in other cases that the rate structure, of which the Morrell rates are a part, was designed to include such services. For example, see *Chicago Live Stock Exchange* v. *Atchison, T. & S. F. Ry. Co.*, 219 I.C.C. 531, 546; *Omaha Live Stock Exc.* v. *Chicago & N. W. Ry Co.*, 178 I.C.C. 1, 14. Thus, we submit, it is clear that the Commission could not have intended that the above conclusion as to "many" of the industries be a finding as to Morrell. The Commission does not and cannot point to evidence of record to support such a finding with respect to Morrell. We believe that a finding that the line-haul rates paid by Morrell were not fixed to include these services is an important and material one in proceedings such as this, under section 6(7) of the Interstate Commerce Act, to determine what services are contemplated by those line-haul rates. The Supreme Court has considered this question important. *United States* v. *American S. & T. Plate Co.*, 301 U.S. 402, 404; *United States* v. *Wabash R. Co.*, 321 U.S. 403, 406; *United States* v. *United States Smelting, R. & M. Co.*, 339 U.S. 186, 196, 197. We believe that the failure of the Commission to make a finding as to Morrell on this material question is not in accordance with the Administrative Procedure Act, Section 8(b), 5 U.S.C. Sec. 1007 (b).

## V.

Other substantial questions arise in this case because part of the service performed by the industry has to do with preparing the empty car for loading—which is actually the duty of the carriers. These preparatory services are performed before loading and before the line-haul rate becomes involved. For example, if the car is not clean, the Bureau of Animal Industry inspector may reject it, and no question of the line-haul rate is involved. Or, if the car is out of repair, it can be rejected and no line-haul rate comes into play. All shippers are entitled to a suitable car and it is clear that switching for the purpose of preparing a suitable car cannot be passed off by the Commission in this case as switching merely for industry convenience. The Commission approved switching for these services by the carriers in *Sioux City Terminal Railway Switching*, 241 I.C.C. 53. A similar holding was made in *Union Tank Car Co. Terminal Service*, 268 I.C.C. 338. "Shippers generally" are legally entitled to, and receive, a suitable car. There is no "principle" in the report in *Ex Parte 104, Part II*, dealing with this. It is arbitrary to hold one way at this plant and just the contrary at another. It is contrary to law. Nor can switching for preparation of a car become a duty of one other than the rail carriers by reason of the level of private car mileage allowance, as held by the Commission in this proceeding. This is transportation and car service required of rail carriers by law, and mileage allowance questions are not in issue in proceedings seeking to determine carrier duty under line-haul rates. Sections 1(3), 1(4), 1(10) and 1(11) of Part I of the Interstate Commerce Act, 41 Stat. 474, 49 U.S.C. Pars. 1(3), 1(4), 1(10) and 1(11); *Union Tank Car Co. Terminal Service*, 268 I.C.C. 338, 342. This important question was absent in the other Supreme Court cases arising out of the *Ex Parte 104, Part II* proceedings, and was not mentioned in the motion to affirm.

## VI.

In the motion to affirm reference is made to appellants' contention that the Commission's order results in discrimination as between rail and motor carriers in violation of the National Transportation Policy (49 U.S.C., Notes preceding §§ 1, 301, 901 and 1001). And the statement is made that this contention has been advanced in previous cases but has not prevailed. No citations are given, and appellants are unaware of any cases where this Court has passed upon the issue raised herein. That issue is this: The Commission has undertaken to state that, with respect to rail carriers only, the line-haul rate includes delivery up to a point where interference is encountered from the industry. With respect to motor carriers, over which they have similar jurisdiction, the Commission says that it has had no occasion to make a similar pronouncement. The net effect of this position is that motor carriers are permitted to perform more service under their line-haul rates than are rail carriers under similar circumstances. The question then is, does the Commission have the right to say that *as a matter of law* rail carrier service must stop at a point of interference, and, by inaction, permit motor carriers to proceed beyond such point? As far as we can determine this question has never been decided by this Court.

## VII.

Another important issue is whether the Commission could base its order, in whole or in part, on findings made with respect to operations and conditions no longer in existence. In its report of March 12, 1951, the Commission adopted the findings made in its prior reports and presumably based its order thereon, although the record clearly shows that many changes were made in the plant since the first report was issued. It cannot be determined how much of the Commission's conclusions are based on

the conditions described in the prior reports which are no longer in existence. Thus, there is raised the question of whether the conclusions in the report of March 12, 1951, are based on proper findings which relate to existing conditions or whether the decision should be set aside because based on conditions no longer in existence. *Atchison, T. & S. F. Ry. Co.* v. *U. S.*, 284 U.S. 248.

In addition to the issues above stated, there is the basic issue of whether the Commission's order contains adequate findings supported by substantial evidence. This is not an issue lightly to be set aside by the mere observation that the Commission had before it evidence of the same type and character as introduced in other *Ex Parte 104* cases. To do such is to clothe the Commission with arbitrary powers not conferred by the Interstate Commerce Act. The record must be examined in the light of this Court's decision in the recent case of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, and a determination must be made of whether the record as a whole supports the Commission's conclusions. Appellants' contention is that it does not. In line with the ruling in the *Universal Camera* case the Commission has no arbitrary power to ignore or disregard the evidence which will not support its order and rely on such scraps of evidence as it may find which could be construed as supporting it. The question is whether the Commission violated the rule in the *Universal Camera* case by picking out extreme, unusual or assumed situations and using them as the basis for an order while at the same time ignoring the great bulk of the evidence which shows that livestock is being delivered without interference and that dead freight could also be handled by the rail carriers with their own engines without interference attributable to the industry.

Because of the substantial questions of vital public importance presented by this appeal—questions which have never been decided by this Court—appellants respectfully

pray that the motion to affirm be denied and that the case proceed to a determination on its merits.

Respectfully Submitted,

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